Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

THE CITY OF CASTLE ROCK, and
GILBERT R. VAUGHN, in his
Official Capacity and Individually,

Petitioners,

v.

MICHAEL D. HUSON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") effectively eliminate the prohibition against basing municipal liability on *respondeat superior* by holding that a municipality may be held liable under 42 U.S.C. § 1983 (1981) ("Section 1983") simply because an arrest was made by the city's police chief, where there is no evidence that the arrest was made pursuant to an express or *de facto* city policy and where the police chief's policy-making authority is limited by a statute and the arrest was made contrary to the policy established by that statute?

2. Did the Ninth Circuit err in affirming a Judgment against a police officer on Plaintiff's Section 1983 claims (i) by ruling that a jury must determine whether a police officer is entitled to qualified immunity if there are any issues of fact, where that ruling is contrary to this Court's decision in *Hunter v. Bryant*, ___ U.S. ___, 112 S. Ct. 534 (1991), regarding who should decide the issue of qualified immunity and where there is a split among the Circuits regarding whether the issue is one for the court or one for the jury, and (ii) by effectively eliminating the defense of qualified immunity in cases involving warrantless arrests by basing its decision on a case that was not decided until *after* the arrest in this matter was made, and by holding that the question whether an officer is entitled to qualified immunity is controlled by, and coextensive with, the separate question whether there was probable cause?

LIST OF PARTIES

Petitioners (Defendants-Appellants in the Ninth Circuit):

The City of Castle Rock

Gilbert R. Vaughn, in his official capacity and individually

Respondent (Plaintiff-Appellee in the Ninth Circuit):

Michael D. Huson

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To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit (filed on October 29, 1993), which affirmed the Judgment (entered January 13, 1992) of the United States District Court for the Western District of Washington.

OPINIONS BELOW

The Opinion of the Ninth Circuit is an unreported Memorandum decision and is reprinted herein as Appendix A.

The Judgment of the United States District Court for the Western District of Washington following a jury trial is reprinted herein as Appendix B.

JURISDICTION

The Opinion and Judgment of the Ninth Circuit were filed on October 29, 1993. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. The Ninth Circuit entered an Order on April 21, 1994 denying that Petition (*see* Appendix C). This Court has jurisdiction to review the Judgment and Opinion of the Ninth Circuit pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 (1981) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

> or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Wash. Rev. Code § 10.31.100 (1988) provides:

> A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant.

STATEMENT OF THE CASE

Plaintiff-Respondent Michael Huson ("Plaintiff") was the former mayor of the City of Castle Rock ("City") and also was a Lion's Club member. Plaintiff chaired a Lion's Club fundraiser at a weekend motorcycle race. On Saturday night, the City Treasurer, who also was a Lion's Club member, offered to store the proceeds in the City vault. Plaintiff refused. On Sunday, Plaintiff left the fundraiser early. After closing the concession stand, Carrol Woodworth, another Lion's Club member, took the proceeds to Plaintiff, who put the money in the trunk of his car. The next day, Plaintiff reported that the money had been stolen. (Tr II-194, 204-05, 216, 218, 224, 228, IV-601, 621)

Plaintiff told Officer Shapley that Carl Lorton, one of Plaintiff's foster children, had run away and that Lorton had left a note (Ex 1-B) stating that he was leaving with some friends. Plaintiff also said that he had found another note (Ex 1-C) in Lorton's room containing tabulations totaling $1,299.15. Plaintiff reported that many of Lorton's possessions were missing, including a "boom

box" and more than 100 cassette tapes, that Lorton had a criminal history and was a client at the Toutle River Boys Ranch, and that Lorton had stolen money from Plaintiff in the past. Shapley gave the county dispatcher a description of Lorton to put on the statewide radio. (Ex 1-A; Tr I-83-87, 89-93) The prosecutor subsequently agreed to issue a warrant for Lorton's arrest. (Ex 1-D; Tr II-26-28)

Three weeks later, Petitioner Police Chief Gilbert Vaughn ("Vaughn") received a telephone call from the president of a local bank. The president told Vaughn that at the time of the theft, Plaintiff's property was undergoing foreclosure, that Plaintiff had made out-of-the-ordinary cash deposits exceeding $1,000 just after the theft, and that Plaintiff then wrote a check to cover his arrearages by the cure deadline, which was five days after the theft. Vaughn met with the head teller, who confirmed the information. The head teller also reported that on the day of the cure deadline, she had told Plaintiff that his account still was too short to cover the arrearages, and that Plaintiff left and later returned and deposited an additional $100 in cash. (Exs A-5, A-10; Tr II-32-33, 38, 41-46, IV-570-75, 578-79)

Vaughn reviewed Plaintiff's bank records, prepared a summary of his accounts,[1] and concluded that Plaintiff had made some deposits shortly after the theft on days that were unusual relative to Plaintiff's deposit history,

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[1] Vaughn made an error in one of his recordings on that summary. He testified that the error was not important in view of what he was looking for – whether similar large deposits had been made in the past around the 19th and 20th of the month. (Tr II-52-53)

although the aggregate amount of the deposits for the month was not unusual. *Vaughn* determined that other than Plaintiff's rental property, he had no other signs of income or cash receipts.[2] Vaughn tried to interview Plaintiff's tenants to determine whether they had paid their rent late. (Exs 1-F-1-K, A-4; Tr II-47, 50-55, 116, III-310, 342, IV-686)

The City Treasurer told Vaughn that Plaintiff had refused to secure the fundraiser proceeds in the City vault. The Treasurer also said that Plaintiff had stopped attending Lion's Club gatherings right after the theft. (Ex A-11; Tr IV-601-04)

Vaughn made several contacts with the Boys Ranch, trying to locate Lorton. (Tr II-48, 60-61, 84, IV-687) Later, Vaughn and Officer West went to Mt. Vernon to try to find Lorton. They learned that Lorton was in a nearby town and they contacted his grandmother, who called Lorton. (Ex A-6; Tr II-71-72) Lorton voluntarily met with Vaughn, waived his *Miranda* rights, and agreed to be interviewed. Lorton also gave Vaughn a handwritten statement. (Exs 1-L, 1-N, A-6, Tr II-71-72)

Lorton denied any involvement in the theft. He said that on the day he left, he rode his bicycle to Martin Flores' house in Kelso to ask about a job. Lorton did not know Flores' address, but gave Vaughn a description of the area. Flores had told Lorton that Flores might have a job available. Lorton had left very early because Flores

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[2] Plaintiff received money from the State for his two foster children. However, those payments were made at the end of the month. (Tr II-270, III-366-67)

left early for work and Lorton wanted to catch Flores before he left. When Lorton arrived, Flores already was gone. Lorton then took a bus to Seattle; he paid for the ticket with money he had withdrawn from the bank a few days earlier. (Exs 1-M, A-6; Tr II-71-75, 77-78, 81) Lorton told Vaughn that he had left his "boom box" and collection of stereo tapes at Plaintiff's house. (Tr II-93)

Lorton denied writing the "I'm leaving" note or the figures on the tabulation note. He admitted that the other writing on the tabulation note was his. Lorton declined to take a polygraph. (Tr II-78-81, 112) Vaughn did not obtain a handwriting exemplar, but compared the "I'm leaving" note with Lorton's signature on the *Miranda* rights card and also had Lorton rewrite the note.[3] Vaughn believed that Lorton had not been entirely honest and believed that he had written the "I'm leaving" note. Vaughn did not obtain Lorton's criminal history, but assumed that he had an extensive history because he was a client of the Boys Ranch, which housed repeat juvenile offenders. (Tr II-48, 68-70, 79-80, 84, 86, 101, III-294, IV-687-88)

Vaughn continued the investigation. He interviewed Alex Neal, Plaintiff's other foster child, who confirmed that Lorton had told Neal that Lorton was going to see Flores. Neal also confirmed that Lorton had left his "boom box" and tapes behind. (Exs 1-R, 1-Q, A-7; Tr II-75,

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[3] A handwriting analysis done after Plaintiff's arrest indicated that Lorton had written the "I'm leaving" note, but was inconclusive as to the tabulation note. There were some indications that Lorton had written the tabulation note, but Lorton already had admitted that he wrote a portion of that note. (Ex 25; Tr II-80-81, III-325)

89-99, 101) Vaughn attempted to obtain Lorton's bank records to verify whether Lorton had withdrawn money before he left. The bank confirmed that a withdrawal had been made, but would not release any other information. (Tr II-81) Vaughn also tried to locate Flores. He found a Martin Flores in the phone book and went to the address that was listed. The house was vacant, but the area was similar to what Lorton had described. (Tr II-76-77)

Vaughn also checked the information that Plaintiff had given. Vaughn interviewed Woodworth, who stated that he had delivered the money to Plaintiff and that Woodworth had not seen anyone else in Plaintiff's yard when Woodworth delivered the money. Woodworth also stated that Plaintiff had stopped attending Lion's Club gatherings as frequently as he had in the past and that Plaintiff was "financially pinched." (Tr II-103-06, 116-17, III-224, IV-623-25, 632-35)

Both Lorton and Neal had said that Lorton had left behind some property, but those items were not included in the things that Plaintiff returned to the Boys Ranch.[4] Based on that discrepancy and the information from the bank, Vaughn believed that Plaintiff had not been completely honest. (Tr II-93, 100-01)

Throughout the investigation, Vaughn was in contact with Deputy Prosecutor Furman. Vaughn did not tell Furman that Lorton declined to take a polygraph. Vaughn

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[4] Vaughn subsequently learned that Plaintiff had taken the tapes, the "boom box," and other items of Lorton's property and placed them in storage at the Lion's Club Food Bank. (Ex A-9, A-15; Tr IV-585-86)

sent his file to Furman and discussed the case with him, and they agreed that Vaughn should interview Plaintiff. Furman told Vaughn that if Plaintiff refused to give an explanation, Vaughn should arrest Plaintiff because there was probable cause to believe that Plaintiff had taken the money. When Plaintiff refused to make a statement, Vaughn arrested him. (Ex 9; Tr II-102-03, 106-10, 112, 117, 292-93, 320) After Plaintiff's attorney provided additional information to the prosecutor, the charges were dismissed. (Ex 9-F; Tr II-171-74, 273, 317)

Plaintiff brought an action against the City alleging, *inter alia*, that Defendants had violated Section 1983 by depriving Plaintiff of his Fourth Amendment rights.[5] After the Ninth Circuit affirmed the District Court's denial of Defendants' motion for summary judgment on qualified immunity, a jury trial was held. The jury returned a verdict for Plaintiff in the Section 1983 claims,[6] and awarded $200,000 in compensatory damages against Vaughn and the City, and $10,000 in punitive damages against Vaughn. (App B) The District Court awarded $253,130.64 in attorney fees and expenses pursuant to 42 U.S.C. § 1988. The Ninth Circuit affirmed the Judgment (App A), and subsequently denied Defendants' Petition for Rehearing and Suggestion for Rehearing *En Banc* (App C).

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[5] Plaintiff also alleged state law claims for false arrest and malicious prosecution.

[6] The jury also found in favor of Plaintiff on his state-law claims, and found in favor of Defendants on Plaintiff's due process claims.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit has erased the requirement established by this Court that before a city can be held liable under Section 1983, a plaintiff must establish that the conduct giving rise to the claim was based on some policy, custom, or usage of the city. The Ninth Circuit imposed liability based on *respondeat superior* by holding that the City could be liable under Section 1983 simply because the City's police chief made an arrest without probable cause, where the arrest was made contrary to a statutory policy governing such arrests and where there was *no* evidence that the City had a *de facto* policy permitting arrests in violation of the statute.

The Ninth Circuit erroneously affirmed the Judgment against the City on the ground that the jury might have found that Vaughn acted with reckless disregard for Plaintiff's rights. (App A-15) A discretionary decision made by a person who does not have the authority to make policy with respect to the action at issue cannot give rise to municipal liability. The Ninth Circuit effectively imposed liability on the City based on *respondeat superior* because there was *no* evidence that Plaintiff was arrested pursuant to an express or *de facto* municipal policy, and because whatever policy-making authority Vaughn may have had did not include the authority to make policy regarding the level of suspicion required for warrantless arrests, as that policy was controlled by a state statute governing such arrests.

In ruling on whether the City could be held liable under Section 1983, the Ninth Circuit blurred the material distinction between policy-making decisions made by

public officials with policy-making authority and discretionary decisions made by public officials within the parameters of an existing policy.[7] The former is the kind of decision that may subject a public body to liability under Section 1983. The latter is not. Imposing liability for the latter type of decision amounts to imposing liability on the basis of *respondeat superior*, which was not intended by Congress when it enacted Section 1983. *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 691-94 (1978).

To be entitled to a judgment against the City, Plaintiff had to establish (1) that Vaughn arrested Plaintiff pursuant to a City policy, custom, or usage, (2) that Vaughn had final policy-making authority on the question whether such an arrest could be made, and (3) that Vaughn's decision to arrest Plaintiff was made in order to execute City policy. *See St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988); *Pembaur v. Cincinnati*, 475 U.S. 469, 482-83 (1986); *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. at 694. The City could not be held liable simply because a City employee had exercised some discretion in making the arrest. *St. Louis v. Praprotnik*, 485 U.S. at 126. As a plurality of this Court stated in *Pembaur v. Cincinnati*:

> [N]ot every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to

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[7] In ruling on that issue, the Ninth Circuit ignored the City's challenge regarding whether that claim should even have been submitted to the jury. The Ninth Circuit noted that the City had raised the issue, but the Court resolved the issue simply by reviewing the propriety of the jury instruction. (App A-15)

> establish municipal policy with respect to the action ordered. The fact that a particular official – even a policymaking official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.

475 U.S. at 481-82 (citations and footnotes omitted).

The fact that a public official has authority to make policy does not mean that every action taken by that official is a policy-making action. A policy maker can make a discretionary decision under existing policies that does not constitute making a new policy. Moreover, a policy-making official can violate established policy in the same way that any other public employee can violate policy. In this case, the fact that Vaughn could make some policies for the City does not mean that he was making policies with every action that he took. As Justice White noted in his concurring opinion in *Pembaur*, where there is no evidence of an express or *de facto* policy authorizing arrests without probable cause, the fact that a senior public official made the arrest is not sufficient to impose municipal liability:

> Local law enforcement officers are expected to obey the law and ordinarily swear to do so when they take office. Where the controlling law places limits on their authority, they cannot be said to have the authority to make contrary policy. . . . If deliberate or mistaken acts . . . , admittedly contrary to local law, expose the county to liability, it must be on the basis of *respondeat superior* and not because the officers' acts represent local policy.

> . . . A sheriff, for example, is not the final policymaker with respect to the probable-cause requirement for a valid arrest. He has no alternative but to act in accordance with the established standard; and his deliberate or mistaken departure from the controlling law of arrest would not represent municipal policy.

475 U.S. at 486.

The question whether a public official has policy-making authority is a question of state law; it is *not* a question of fact. A federal court is not justified in assuming that policy-making authority lies somewhere other than where the applicable law purports to put it. *St. Louis v. Praprotnik*, 485 U.S. at 124, 126. Moreover, "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." 485 U.S. at 127. In this matter, the state legislature established the policy for all state law enforcement officials with respect to when an officer may make a warrantless arrest. *See* Wash. Rev. Code § 10.31.100 (1988).

Plaintiff failed to establish that Vaughn arrested Plaintiff pursuant to an "express" municipal policy. There was *no* evidence that the City Council had promulgated a policy authorizing warrantless arrests without probable cause. There also was no evidence that the Council had delegated to Vaughn the authority to promulgate such a policy. On the contrary, a Washington state statute limited Vaughn's authority to make a warrantless arrest to those circumstances where there was probable cause. *See* Wash. Rev. Code § 10.31.100 (1988). Because Vaughn's discretion

with respect to arrests was constrained by a policy that was not of Vaughn's making (*i.e.*, a statute), that statutorily-established policy was the act of the City, rather than Vaughn's alleged departure from that statutory policy.

Moreover, there was *no* evidence that Vaughn had, in fact, established a policy that was contrary to the state statute. Even though Vaughn had some policy-making authority, that does not automatically mean that Plaintiff's arrest was an act pursuant to City policy. In exercising his discretion whether to make an arrest within the parameters of the existing policy, Vaughn could mistakenly make an arrest without probable cause just as any other officer could. To hold the City liable under Section 1983 merely because the arrest was made by its police chief amounts to nothing more than an application of the doctrine of *respondeat superior*, which is prohibited. *See Pembaur v. Cincinnati*, 475 U.S. at 486 (White concurring); *see also St. Louis v. Praprotnik*, 485 U.S. at 126; *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. at 694.

Thus, as was the case in *Praprotnik*, even if one assumes that Vaughn acted with deliberate disregard for Plaintiff's rights, that says nothing about those whom the state law had established as the makers of policy in matters of warrantless arrests. The policy-making authority with regard to warrantless arrests did not lie with Vaughn, even though he was left with the discretion to make warrantless arrests within the established policy, and even assuming that he arrested Plaintiff in violation of that policy. *See St. Louis v. Praprotnik*, 485 U.S. at 130.

Plaintiff also failed to establish that Vaughn had acted pursuant to a *de facto* policy. There was *no* evidence that Vaughn or any other City officer had made prior arrests without probable cause. There also was *no* evidence that the City had actual or constructive knowledge of prior unconstitutional arrests such that the Court could infer that the City had a policy of making unconstitutional arrests. Proof of a single incident of unconstitutional activity is not sufficient to impose *Monell* liability unless there is proof that the incident was caused by an existing policy. *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985).

Finally, Plaintiff failed to establish liability on the basis of an action taken by a policy maker with deliberate disregard for Plaintiff's rights. Before the City could be held liable under Section 1983 for Vaughn's alleged deliberate disregard for Plaintiff's rights, Plaintiff still had to establish that Vaughn had policy-making authority with regard to the arrest. The fact that Vaughn could establish some policies does not mean that he was authorized to make policies with respect to warrantless arrests made without probable cause. Moreover, simply because Vaughn had some policy-making authority does not mean that the City could be held liable for every discretionary decision that Vaughn made, even if the decision involved a disregard for someone's rights. As a plurality of this Court held in *St. Louis v. Praprotnik*, "[i]f the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability." 485 U.S. at 126. As established above at pages 12-13, Vaughn did not have the authority to establish policy that was contrary to

state law. Therefore, Vaughn could not have been a policy maker with respect to warrantless arrests, even if he had acted with deliberate disregard for Plaintiff's rights.

Furthermore, municipal liability based on the deliberate disregard for the plaintiff's rights has been applied only where it is the public body that has made a decision not to take some action to protect the rights at issue; *e.g.*, the public body failed to provide its police officers with adequate training. *See Canton v. Harris*, 489 U.S. 378 (1989). Plaintiff's claim is not based on something that the City did or did not do, but on Vaughn's discretionary decision to make an arrest.

The Ninth Circuit erred in holding that the City could be held liable simply because the jury could have found that Vaughn arrested Plaintiff with a deliberate disregard for Plaintiff's constitutional rights.[8] That decision amounted to

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[8] Even if Plaintiff could somehow establish that the issue of municipal liability properly was submitted to the jury, the verdict could not stand because the jury was instructed that it could return a verdict against the City on grounds that were not supported by *any* evidence. *See Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 384 (1991); *Sunkist Growers v. Winckler & Smith Co.*, 370 U.S. 19, 29-30 (1962).

The jury was instructed that it could find the City liable on any one of three bases: (1) a policy statement or decision officially promulgated by the City's lawmaking officers or by a policy-making official; (2) an unconstitutional act or ratification of such an act by a policy-making official where the decision maker possessed final authority to establish policy with respect to that decision; or (3) an unconstitutional act resulting from a policy maker's reckless disregard for, or deliberate indifference to, Plaintiff's rights. (Tr V-732-33) Plaintiff did not present *any* evidence as to the first two bases, and the Ninth Circuit did not

holding the City liable on the basis of *respondeat superior*, which is prohibited.

II.

The Ninth Circuit has effectively eliminated the defense of qualified immunity in cases involving warrantless arrests by (1) holding that the issue may be decided by the jury, (2) allowing the determination of whether an officer is entitled to qualified immunity to be resolved based on case law that was not in existence when the arrest was made, and (3) holding that the determination of whether there was probable cause is "dispositive of" the question whether the officer is entitled to qualified immunity. That erosion of the availability of the qualified immunity defense is contrary to this Court's direction to the Ninth Circuit in *Hunter v. Bryant, supra*, and there is a split among the Circuits regarding the proper method of analysis.

The Ninth Circuit affirmed the Judgment of the District Court based on the Ninth Circuit's conclusion that there was a question of fact regarding whether Vaughn was entitled to qualified immunity. In doing so, the Ninth Circuit disregarded this Court's direction to that Court in *Hunter v. Bryant, supra*, that the decision on qualified immunity ordinarily is one for the court. The Ninth Circuit also effectively eliminated qualified immunity for

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address those bases. Instead, the Ninth Circuit held only that the jury "could have" found for Plaintiff on the third basis and, therefore, that the verdict should stand. (App A-15) Even if the Ninth Circuit was correct regarding the third basis, which it was not, because the jury "could have" found for Plaintiff on one of the first two bases not supported by evidence in the Record, the verdict should have been set aside.

police officers who make warrantless arrests by relying on a case not yet decided when Plaintiff was arrested and by holding that the decision whether an officer is entitled to qualified immunity is governed by the decision whether there was probable cause.

A. The Ninth Circuit employed a method of analysis that conflicts with this Court's decision in *Hunter v. Bryant, supra,* and there is a split among the Circuits regarding the proper method of analysis.

In *Hunter v. Bryant, supra,* this Court reversed the decision of the Ninth Circuit and held that both the Ninth Circuit and the District Court had erred in denying the defendant's motion for summary judgment on the issue of qualified immunity. The Ninth Circuit had held that the question whether a reasonable police officer could have believed that he had probable cause was a question of fact and that the issue could be resolved by summary judgment only if there was only one reasonable conclusion that a jury could reach. *Bryant v. U.S. Treasury Dept., Secret Service,* 903 F.2d 717, 721 (9th Cir. 1990). This Court stated:

> This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. . . . Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.

Hunter v. Bryant, 112 S. Ct. at 537 (citation omitted).

In reaching its decision, this Court reviewed the information available to the F.B.I. agents and held that the governing question was whether the agents acted reasonably under settled law in the circumstances at the time presented. This Court noted that it previously had characterized the governing inquiry as whether "a reasonable officer could have believed [the plaintiff's arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." 112 S. Ct. at 536; *see Anderson v. Creighton*, 483 U.S. 625, 641 (1987). This Court also reiterated the established rule that "[e]ven law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Hunter v. Bryant*, 112 S. Ct. at 536. This Court held that the agents were entitled to qualified immunity as a matter of law, "[e]ven if [the Court] assumed, arguendo, that [the officers] (and the magistrate) erred in concluding that probable cause existed to arrest [the plaintiff], the agents nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken." 112 S. Ct. at 537.

This Court's conclusion that the agents were entitled to qualified immunity as a matter of law, notwithstanding the character of other evidence present in the record, demonstrated that this Court requires the *courts* to evaluate the reasonableness of an official's conduct based on the information known to the officer under the circumstances. Although additional evidence might lead a reasonable officer to reach a different conclusion, that is not sufficient to deny qualified immunity. 112 S. Ct. at 537.

In this matter, the Ninth Circuit evaluated the issue of qualified immunity by reviewing the Record to determine whether there was evidence from which the jury could conclude that Vaughn was not entitled to qualified immunity. (App A-5, 11) As discussed above, that was an improper method of review.[9]

As discussed below at pages 24-27, there was ample evidence from which a reasonable police officer could have concluded that there was probable cause to arrest Plaintiff. Under the facts and circumstances of this case, qualified immunity was *not* an issue for the jury.

The confusion concerning the nature of the issues to be decided by a court with respect to qualified immunity is reflected in the fact that there is a split among the Circuits regarding the question whether the issue of qualified immunity is one to be decided by the court as a matter of law, or one to be decided by the jury. The Seventh, Eighth, Tenth, and Eleventh Circuits have held

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[9] The decision of the Ninth Circuit also conflicts with that Court's recent application of the rule established in *Hunter v. Bryant, supra,* to questions of qualified immunity. *See Act Up!/ Portland v. Bagley,* 988 F.2d 868, 873 (9th Cir. 1993). In fact, what the Ninth Circuit did in this case was to adopt the method of review advocated by Judge Norris in his opinion dissenting from the denial of *en banc* review in *Act Up!/Portland v. Bagley,* 988 F.2d at 874-83. The Ninth Circuit also relied on its previous decision in *Kennedy v. Los Angeles Police Dept.,* 901 F.2d 702 (9th Cir. 1989), in reaching its conclusion in this matter. (App A-11) However, as the Ninth Circuit noted in *Act Up!/Portland v. Bagley, supra,* the decision in *Kennedy* predates this Court's decision in *Hunter v. Bryant.* 988 F.2d at 872.

that the issue is for the court.[10] The First, Second, Fourth, and Fifth Circuits have held that the issue is for the jury.[11]

Under the law established by this Court in *Hunter v. Bryant, supra,* the Ninth Circuit applied an erroneous standard of review and left the issue of qualified immunity to be decided by the jury. Because Vaughn had sufficient information upon which an officer reasonably could conclude that there was probable cause, Vaughn was entitled to qualified immunity. Even if Vaughn could have done more, the possibility that additional information might lead a reasonable officer to a different conclusion is not sufficient to deny qualified immunity. *See Hunter v. Bryant* 112 S. Ct. at 537.

B. The Ninth Circuit, by relying on a case decided after the arrest in this matter was made, eliminated the requirement that qualified immunity be based on law that was clearly established at the time of the arrest.

In reaching its conclusion that there were issues of fact, the Ninth Circuit agreed with Plaintiff's argument that the issue was for the jury because Vaughn should have done some additional investigation. (App A-12)

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[10] *See Sims v. Metropolitan Dade County,* 972 F.2d 1230, 1233-34 (11th Cir. 1992); *Simkunas v. Tardi,* 930 F.2d 1287, 1291 (7th Cir. 1991); *Snell v. Tunnell,* 920 F.2d 673, 696 (10th Cir. 1990), *cert. denied sub nom Swepston v. Snell,* 499 U.S. 976 (1991); *Gorra v. Hanson,* 880 F.2d 95, 97 (8th Cir. 1989).

[11] *See Hurlman v. Rice,* 927 F.2d 74, 79-80 (2d Cir. 1991); *Santiago v. Fenton,* 891 F.2d 373, 386-87 (1st Cir. 1989); *Melear v. Spears,* 862 F.2d 1177, 1184 (5th Cir. 1989); *Turner v. Dammon,* 848 F.2d 440, 447 (4th Cir. 1988).

However, at the time Vaughn made the arrest, there was no clearly-established law requiring an officer who had probable cause to do additional investigation to try to obtain exculpatory information. In fact, there was law to the contrary. *See Baker v. McCollan*, 443 U.S. 137, 145-46 (1979). Other Circuits have adopted a contrary view regarding the need to conduct additional investigation.[12]

In reaching its conclusion, the Ninth Circuit relied on its previous decision in *Merriman v. Walton*, 856 F.2d 1333 (9th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989). (App A-12) However, that case was decided September 7, 1988, a month *after* Plaintiff was arrested.[13] The determination whether an officer is entitled to qualified immunity must be based on the law that was clearly established at the time of the arrest. Because the Ninth Circuit issued its decision in *Merriman v. Walton, supra, after* Plaintiff's arrest, any law established by that decision cannot be used to defeat qualified immunity. *See Anderson v. Creighton*, 483 U.S. at 639-40; *Mitchell v. Forsyth*, 472 U.S. 511, 531-32, 536 (1985).

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[12] *See Torchinsky v. Siwinski*, 942 F.2d 257, 264 (4th Cir. 1991); *Simkunas v. Tardi*, 930 F.2d at 1292; *Krause v. Bennett*, 887 F.2d 362, 371 (2d Cir. 1989); *Schertz v. Waupaca County*, 875 F.2d 578, 583 (7th Cir. 1989); *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 438-40 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987); *Bodzin v. City of Dallas*, 768 F.2d 722, 726 (5th Cir. 1985).

[13] Moreover, *Merriman* involved a plaintiff who had provided information to police that gave the police reason to conduct further investigation. In this matter, Plaintiff chose to exercise his constitutional right not to speak. (Tr II-109-10) Although he was entitled to do so, Plaintiff cannot now claim that Vaughn should have conducted additional investigation to learn things that Plaintiff chose not to say.

As discussed above, the Ninth Circuit erroneously left the issue to be decided by the jury. Moreover, because there was no clearly-established law requiring additional investigation, any issue of fact regarding whether Vaughn should have done additional investigation could not have affected Vaughn's entitlement to qualified immunity.

C. The Ninth Circuit eliminated the availability of qualified immunity in cases involving probable-cause arrests by holding that the question whether an officer is entitled to qualified immunity is controlled by the question whether there was probable cause for the arrest.

In ruling on the question whether Vaughn was entitled to qualified immunity, the Ninth Circuit stated:

> Our previous decision about the lack of probable cause is dispositive of the qualified immunity question.

(App A-11)[14] That holding is contrary to several decisions of this Court. The issue whether an officer is entitled to qualified immunity is not coextensive with whether the officer violated the plaintiff's constitutional rights, but rather is a separate and distinct inquiry. Therefore, even if there was not probable cause, that is not a sufficient basis for denying qualified immunity.

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[14] The Court went on to state that qualified immunity is not available where a reasonable officer would have conducted further inquiry before making a warrantless arrest. (App A-12) As discussed above, the Court reached an erroneous conclusion in that regard and also based its decision on a case that was not decided until *after* the arrest was made in this matter.

This Court has made clear that an officer who makes a warrantless arrest without probable cause is entitled to qualified immunity as long as a reasonable officer could have believed that there was probable cause. That standard " 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Hunter v. Bryant*, 112 S. Ct. at 537, *quoting, Malley v. Briggs*, 475 U.S. 335, 341 (1986). Moreover, "[e]ven defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard." *Davis v. Scherer*, 468 U.S. 183, 190 (1984). The Ninth Circuit erred in equating the "reasonableness" involved in the question whether there is probable cause with the "reasonableness" that bears on the entitlement to qualified immunity.

Government officials performing discretionary functions are entitled to qualified immunity where their actions reasonably could have been thought to be consistent with the rights they are alleged to have violated. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). Whether Vaughn may be held liable must be determined by examining the "objective reasonableness" of Plaintiff's arrest based on the specific facts and circumstances known to Vaughn and assessed in light of the legal rules that were clearly established at the time of the arrest. *See Anderson v. Creighton*, 483 U.S. at 638-40; *Harlow v. Fitzgerald*, 457 U.S. at 819. Vaughn's entitlement to qualified immunity could be defeated *only* if there was a clear absence of reason to believe that he had probable cause (*i.e.*, if, viewed on an objective basis, it was obvious that no

reasonably competent police officer could have concluded that there was probable cause under the totality of the facts and circumstances known to Vaughn). *See Malley v. Briggs*, 475 U.S. at 344-45. If reasonable officers could disagree, or if Vaughn reasonably but mistakenly concluded that there was probable cause, he was entitled to immunity. *Malley v. Briggs*, 475 U.S. at 341. Vaughn acted reasonably based on the information known to him at the time of Plaintiff's arrest and, therefore, Vaughn is entitled to qualified immunity.

The issue in this matter is whether a reasonable police officer could have believed that Plaintiff's arrest was lawful, in light of the clearly-established law and the information that Chief Vaughn possessed at the time of the arrest. Based on the following information, and in light of his training and experience, Vaughn reasonably concluded that Plaintiff was a suspect:

> Plaintiff had a motive. At the time of the theft, his property was facing foreclosure within only a few days. (Ex A-10; Tr II-32-33, III-290, 309)
>
> Plaintiff had opportunity. He had custody of the money and had refused an offer to secure the money in the City vault the previous day. (Exs A-11, A-14; Tr II-216, III-304, 309, 329, IV-601)
>
> Plaintiff made cash deposits of more than $1,000 shortly after the theft. The head teller at Plaintiff's bank told Vaughn the deposits were out of character with Plaintiff's usual banking habits in that they were made mid-month in the form of large bills, whereas Plaintiff generally made deposits at the beginning or end of the month in the form of checks and small bills. (Exs A-5,

A-10; Tr II-32-33, 41-46, III-309, IV-570-75, 578-79)

Plaintiff was unemployed and had no other sources of income. Vaughn determined that Plaintiff had no accounts at any other banks in town. If Plaintiff had other sources of money, it did not make sense that he would let himself get into the financial position of foreclosure. (Tr II-116, III-290, 303, 333-34)

Woodworth and the City Treasurer both had reported that Plaintiff attended Lion's Club meetings far less frequently after the theft. It reasonably could be inferred that his change in behavior was some evidence of consciousness of guilt. (Ex 14; Tr III-309, 326, IV-624-25)

Both Lorton and Neal disputed Plaintiff's statement that Lorton had taken his "boom box" and cassette tapes, and yet Plaintiff did not return those items to the Boys Ranch. (Tr II-79, 92-93, 98-101)

Based on the following information, and in light of his training and experience, Vaughn reasonably concluded that Lorton no longer was a suspect:

Lorton and Neal both stated that they were unaware that the money had been delivered to Plaintiff. (Tr II-82, 98) Prior to the arrest, neither Plaintiff nor Woodworth reported that the boys were in the yard when the money was delivered. (Tr III-222, IV-623, 632-35)

It did not make sense that Lorton would leave behind all of the property that was of apparent value to him if he was running away, and the fact that he left them behind was inconsistent with flight. (Tr II-90, 99, III-309, 335-36)

It was unusual for someone from the Boys Ranch who had committed a crime and who had access to a car not to take the car. (Tr II-86, 90, III-290, 336)

It did not make sense for Lorton to risk taking the money back into the house to count it. (Tr II-87, 90)

If Lorton was guilty, it would not make sense for him to return to a nearby town where he was well known and where it would be logical to look for him, knowing that he was a suspect. (Ex A-5)

Lorton voluntarily met with Vaughn and submitted to a taped interview after being given his *Miranda* warnings, and also gave a written statement. (Tr II-72)

Based on Vaughn's experience and on Lorton's demeanor, Vaughn believed that Lorton was telling the truth about the money. (Tr II-88-90, 101, III-298-99, IV-687-89)

Although Vaughn had doubts about Lorton's complete honesty, Neal confirmed much of what Lorton had told Vaughn about Lorton's whereabouts on the day of the theft, and Lorton also had told Plaintiff about his intentions to seek a tree planting job. (Tr II-74-75, III-231)

Although Vaughn could not locate Flores, the description that Lorton had given Vaughn of Flores' residence was similar to that of the residence that Vaughn found using the phone book, and Neal had confirmed Flores' existence. (Tr II-74-77)

Lorton's bank confirmed that he had withdrawn money in the time frame involved, which was

not contradicted by any evidence until *after* Plaintiff's arrest. (Ex 1-LL; Tr II-81)

There was ample evidence that a police officer reasonably could have concluded that there was probable cause to believe that Plaintiff had committed a felony. Moreover, although there was no clearly-established law at the time Plaintiff was arrested requiring a police officer who had more than one suspect to rule out suspect A before he could have probable cause as to suspect B, there was ample evidence from which a reasonable officer could have concluded that Lorton no longer was a suspect. Because a reasonable officer could have concluded that there was probable cause to arrest Plaintiff, Vaughn was entitled to qualified immunity as a matter of law.

The Ninth Circuit erred in the nature of its review of the question whether Vaughn was entitled to qualified immunity. The Ninth Circuit also erred in basing its decision on a case that was not decided until *after* the arrest in this matter and in holding that the question of qualified immunity was governed by the determination that there was not probable cause for the arrest. Because a reasonable officer could have concluded (based on the information known to Vaughn at the time of Plaintiff's arrest) that there was probable cause, Vaughn was entitled to qualified immunity.

CONCLUSION

This Court should grant certiorari and reverse the decision of the Ninth Circuit and the Judgment of the District Court on Plaintiff's Section 1983 claims on the

grounds (1) that the Ninth Circuit erroneously extended the rules regarding municipal liability to include liability based on *respondeat superior*, and (2) that the Ninth Circuit erroneously turned the question of qualified immunity into an issue of fact and equated a police officer's entitlement to qualified immunity to a ruling regarding whether there was probable cause to make an arrest.

DATED: May 24, 1994.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL D. HUSON, Plaintiff – Appellee, v. THE CITY OF CASTLE ROCK; GILBERT R. VAUGHN, in his Official Capacity and Individually, Defendants – Appellants.	No. 92-35186 D.C. No. CV-89-565-TSZ MEMORANDUM* (Filed Oct. 29, 1993)

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted October 7, 1993
Seattle, Washington

Before: GOODWIN, SCHROEDER, and PREGERSON, Circuit Judges.

The City of Castle Rock and Gilbert R. Vaughn, its chief of police, appeal a judgment entered against them after a jury verdict on Michael D. Huson's suit under 42 U.S.C. § 1983 and Washington state law arising from Huson's arrest without probable cause. We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

FACTUAL BACKGROUND

Huson is a life-long resident of Castle Rock, a Washington city with a population of 2000. Huson was previously mayor of the city for 16 years. Gilbert R. Vaughn is Castle Rock's chief of police.

In May 1988, approximately $1200 disappeared from the trunk of Huson's car. The money belonged to the Castle Rock's Lions Club and represented the proceeds of a Lions Club weekend food concession. A 17-year-old juvenile, who had been placed to live with Huson by a nearby juvenile detention facility, disappeared at the same time the money did. Huson suspected that the juvenile stole the money. Huson immediately reported the theft to the police and provided them with evidence linking the theft to the juvenile boarder.

In August 1988, Vaughn arrested Huson without a warrant at his home for the theft. Vaughn decided to arrest Huson after personally investigating the theft. Huson was charged with theft in the second degree and detained at the city jail for several hours before he was released on bail.

In February 1989, the prosecutor's office formally dismissed the theft charge against Huson. The juvenile boarder was not further investigated or arrested.

PROCEDURAL BACKGROUND

Huson filed a complaint in district court alleging that Vaughn and Castle Rock were liable under 42 U.S.C. § 1983 because his clearly established constitutional

rights under the Fourth, Ninth, and Fourteenth Amendments were violated when Vaughn arrested Huson for theft. Huson also alleged state law claims for false arrest, false imprisonment, and malicious prosecution. Vaughn and Castle Rock moved for summary judgment on all of Huson's claims alleging there was probable cause for Huson's arrest and that Vaughn had qualified immunity. The district court denied the motion.

Vaughn then appealed the denial of his summary judgment motion to our court. We issued a summary affirmance of the district court's denial stating that "[i]t is clearly ascertainable that deposition testimony and police records, viewed in the light most favorable to appellee, showed that a reasonable police officer in appellant's position would have known that he lacked probable cause to arrest appellee because he had not ruled out another suspect." *Huson v. The City of Castle Rock and Gilbert R. Vaughn*, No. 90-35529 (9th Cir. Mar. 22, 1991). The case was remanded to the district court for trial.

Before trial, Vaughn and Castle Rock filed three motions in limine. The first requested that the court exclude expert testimony on the issue of probable cause to arrest and expert testimony on industry standards for criminal investigations. The second motion requested that the court exclude evidence regarding whether defendants had liability insurance. The third motion requested that the court exclude evidence regarding polygraph examinations of the original suspect and Huson. The district court partially granted the defendants' motion to exclude expert testimony, excluding evidence concerning "unprofessional bias," "ulterior motive," or that Vaughn's

investigation would "shock the conscience" or was "outrageous." The district court granted the motion to exclude evidence on whether Vaughn and Castle Rock had liability insurance. The district court denied the motion to exclude evidence regarding polygraph examinations.

When Huson rested his case, Vaughn and Castle Rock moved for directed verdicts on eleven issues. The district court granted defendants' motions for directed verdict with respect to special damages and economic loss, but denied all other motions.

The jury entered a special verdict in favor of Huson on the following questions: whether Vaughn and Castle Rock violated Huson's Fourth Amendment rights by arresting Huson without probable cause; whether Vaughn is entitled to qualified immunity; whether Huson is entitled to prevail on his state law false arrest claim against Vaughn and Castle Rock; and whether Huson is entitled to prevail on his state malicious prosecution claim. The jury did not find in favor of Huson on his claims of malicious prosecution in violation of his substantive and procedural due process rights under the Fourteenth Amendment. The jury awarded Huson $200,000 in compensatory damages against Vaughn and Castle Rock, and $10,000 in punitive damages against Vaughn.

Vaughn and Castle Rock then moved for a judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b). The district court denied the motion. This appeal followed.

STANDARD OF REVIEW

We review de novo the district court's denial of Vaughn and Castle Rock's motions for a directed verdict and for JNOV. *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992) (petition for certiorari pending). Our inquiry is the same as the district court's: we must determine whether the evidence, considered as a whole and viewed in the light most favorable to Huson, reasonably can support *only* a verdict in favor of Vaughn and Castle Rock. A directed verdict or JNOV is not warranted if there is substantial evidence supporting a verdict in favor of Huson. Substantial evidence is such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *Id.*

We review for abuse of discretion evidentiary rulings, and we will not reverse such rulings absent some prejudice. *McGonigle v. Combs*, 968 F.2d 810, 818 n.6 (9th Cir.), *cert. dismissed*, 113 S. Ct. 399 (1992).

We consider jury instructions as a whole to determine whether they are misleading or inadequate. *Oviatt v. Pearce*, 954 F.2d 1470, 1480 (9th Cir. 1992). "The trial judge has substantial latitude in tailoring the instructions," and we review for an abuse of discretion the formulations adopted by the court. *Id.* An error instructing the jury in a civil case does not require reversal if it more probably than not is harmless. *Caballero v. Concord*, 956 F.2d 204, 205 (9th Cir. 1992).

DISCUSSION

A. Probable Cause

1. Directed Verdict and JNOV

Vaughn and Castle Rock contend that, as a matter of law, there was probable cause to arrest Huson and therefore, judgment should be awarded in their favor. We disagree.

An officer has probable cause to arrest where the totality of the facts and circumstances within the officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to warrant an officer of reasonable caution and prudence in believing that the person to be arrested has committed a crime. *Barry v. Fowler,* 902 F.2d 770, 773 (9th Cir. 1990)

In the case at bar, viewing the evidence in the light most favorable to Huson, we cannot say that the only reasonable conclusion was that Vaughn had probable cause to arrest Huson. When Vaughn arrested Huson, Vaughn determined that probable cause existed based on the following information: Huson was behind on his house payments; Huson made some cash deposits after the theft that, according to a bank teller, were unusual for Huson; Huson had turned down the opportunity to lock the money in the city vault on Saturday night; and Huson did not meet in the mornings for coffee with Lions Club members as often as he had in the past. But evidence presented to the jury also showed that Huson's bank records, which Vaughn reviewed, revealed that the deposits were not unusual. The evidence also showed that Huson returned the money to the concession stand Sunday morning and it was returned to him Sunday

evening by another Lions Club member. The theft occurred Sunday night. Finally, the evidence showed that, after the theft, Huson remained active in Lions Club activities throughout the summer before his arrest.

Vaughn also points to evidence that he had ruled out the juvenile boarder as a suspect before arresting Huson. Vaughn, however, apparently accepted the boarder's statement that he did not take the money even though Vaughn did not find the juvenile boarder completely credible. Vaughn also knew that the police report showed that Huson reported having had previous theft problems with the boarder. And Vaughn did not obtain a criminal history of the boarder, which would have revealed several burglaries and thefts.

In addition, Vaughn produced evidence that, before the arrest, Deputy Prosecuting Attorney Furman advised Vaughn that probable cause existed to arrest Huson. But there was also evidence that Vaughn had not revealed all the relevant information to Furman before consulting with him on the arrest. For example, Vaughn did not tell Furman that the juvenile boarder declined to take a polygraph examination.

As the foregoing indicates, there was substantial evidence to support the jury's special verdict that "the constitutional rights of plaintiff Huson [were] violated by his arrest without probable cause by defendant Vaughn. . . . " [ER 45]

2. Expert Testimony

Vaughn and Castle Rock contend that the expert testimony presented by Huson improperly addressed the issue whether Vaughn had probable cause to arrest Huson. They further contend that the expert testimony did nothing more than tell the jury what result to reach and that this was improper, citing the advisory committee's note to Fed. R. Evid. 704.[1]

Rule 704 permits opinion testimony that embraces an ultimate issue to be decided by the trier of fact. Fed. R. Evid. 704(a); *United States v. Kinsey*, 843 F.2d 383, 388 (9th Cir.), *cert. denied*, 488 U.S. 836 (1988), *and cert. denied*, 485 U.S. 836 (1988). "An ultimate issue opinion by a properly qualified expert should not be excluded except in the extreme case where the expert's opinion is inherently misleading or unfairly prejudicial." *Kinsey*, 843 F.2d at 389.

Vaughn and Castle Rock, refer us to three passages of expert testimony "that constituted legal conclusions on

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[1] Fed. R. Evid. 704 provides:

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are for the trier of fact alone.

the precise legal issue in this case. . . . " [Blue Brief at 21; ER 66-67, 75-76 and Tr III 419-21 (the transcript pages not available in the ER will be faxed to Judge Goodwin and Judge Schroeder)]. We find nothing in these passages that would lead us to conclude that the expert testimony was inherently misleading or unfairly prejudicial. The district court did not abuse its discretion in permitting expert testimony on the issue of probable cause.

Vaughn and Castle Rock next argue that the district court erred by permitting expert testimony regarding whether certain evidence would have been material to the prosecutor's determination that there was probable cause. They refer us to one passage of expert testimony in support of their argument. [ER 505-507.]

This testimony was probative because Vaughn rested his determination that there was probable cause partly on the fact that the deputy prosecuting attorney, Furman, told Vaughn before the arrest that probable cause existed. This evidence goes to the issue of probable cause and, again, opinions on this issue were permissible. We see nothing in this additional expert testimony that is inherently misleading or unfairly prejudicial. Therefore, the district court did not abuse its discretion by allowing this testimony.

3. Probable Cause Jury Instruction

The district court instructed the jury that "[t]he existence of probable cause must be determined at the time that the arrest is made. Facts learned or evidence obtained after the arrest or as a result of an arrest cannot be used to support probable cause, unless they were

known to the officer at the moment the arrest was made." Instruction 14A. [ER 41]. Vaughn and Castle Rock contend that this instruction was not complete, that it should have included a statement that information obtained after the arrest cannot be used to *negate* probable cause.

While, arguably, the instruction proffered by Vaughn and Castle Rock is a correct statement of the law, none of the cases cited by the appellants stand for the proposition that such an instruction is required. *See, e.g., Beck v. Ohio,* 379 U.S. 89, 91 (1964); *United States v. Delgadillo-Velasquez,* 856 F.2d 1292, 1298 (9th Cir. 1988); *United States v. Martin,* 509 F.2d 1211, 1213 (9th Cir.), *cert. denied,* 421 U.S. 967 (1975).

We do not find that the instructions given were misleading or inadequate. Therefore, the district court did not abuse its discretion by refusing to add Vaughn and Castle Rock's requested statement to the instruction given.

B. Qualified Immunity

Vaughn contends that, even if he mistakenly believed he had probable cause to arrest Huson, he is entitled to the defense of qualified immunity because a reasonable officer in his position could have believed that probable cause existed.[2]

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[2] Whether a reasonable officer in Vaughn's position could have believed that probable cause existed is the second part of the two-part qualified immunity analysis. *Anderson v. Creighton,* 483 U.S. 635 (1987). The first part, whether the right allegedly violated was clearly established, is not disputed by the parties.

We summarily upheld the district court's denial of summary judgment on the issue of qualified immunity. *Huson*, No. 90-35529 at 2. The district court later denied Vaughn's motion for a directed verdict on this issue and submitted the following question to the jury: "Is the defendant Vaughn entitled to qualified immunity?" The court also instructed the jury on the qualified immunity defense.[3]

We recently held in *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993), that qualified immunity is not in itself a factual issue that would preclude summary judgment, but if a genuine issue of underlying fact exists, the determination cannot be made until the facts have

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[3] The court gave the following instruction to the jury, which was stipulated to by the parties, on the qualified immunity defense:

> If you find that plaintiff has proved his Fourth Amendment claim of a warrantless arrest without probable cause, then you must consider the defendant Vaughn's defense of qualified immunity. This defense does not apply to plaintiff's substantive and procedural due process claims described in Instruction No. 15.
>
> This is an affirmative defense, and the defendant has the burden to prove this defense by a preponderance of the evidence.
>
> Defendant is entitled to a judgment in his favor on the Fourth Amendment claim if he establishes by a preponderance of the evidence that a reasonable officer in his position could have believed that probable cause existed to conclude that plaintiff had committed the crime of theft in the second degree. The standard to be applied is an objective one. The subjective state of mind of the defendant is not relevant.

Instruction No. 14D.

been developed at trial. In this case, genuine issues of fact precluded summary judgment in favor of Vaughn based on qualified immunity. *Huson*, No. 90-35529 at 2. The district court, therefore, properly submitted the issue to the jury. Thus, we review the denial of Vaughn's motions for directed verdict and JNOV under the standards enunciated above.

Our previous discussion about the lack of probable cause is dispositive of the qualified immunity question. *See Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 706 (9th Cir. 1989). Substantial evidence supported the jury's determination that no reasonable officer in Vaughn's position could have believed there was probable cause to arrest Huson for theft in the second degree. Vaughn contends that he had no duty to further investigate the theft, but qualified immunity is inappropriate if a reasonable officer would have made further inquiry before effecting a warrantless arrest. *Merriman v. Walton*, 856 F.2d 1333 (9th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989).

C. Punitive Damages

Vaughn argues that the district court erred by denying his motions for directed verdict and JNOV on the issue of punitive damages because Huson did not present sufficient evidence of the types of conduct that warrant punitive damages.

Punitive damages are recoverable under § 1983 either when a defendant's conduct was driven by evil motive or intent, or when it involved a reckless or callous indifference to the constitutional rights of others. *Morgan v. Woessner*, 997 F.2d 1244, 1255 (9th Cir. 1993).

Viewed in the light most favorable to Huson, we cannot conclude that the evidence can support *only* a verdict in favor of Vaughn on the issue of punitive damages. *See Gillette*, 979 F.2d at 1346. Huson presented evidence that Vaughn acted with reckless and callous indifference to Huson's constitutional rights by conducting an incomplete investigation of the prime suspect, the juvenile boarder. In addition, Vaughn did not give the deputy prosecuting attorney a complete picture of the facts before the prosecuting attorney told Vaughn that probable cause existed to arrest. Furthermore, there was evidence that, at the time of the arrest, Vaughn told Huson to either confess or go to jail and that Vaughn laughed at Huson during his booking. Finally, Vaughn's statements to the press after the prosecutor indicated he was going to dismiss the charges against Huson reflect Vaughn's personal animosity towards Huson. At that time, Vaughn stated that a dismissal "did not prove the former mayor is innocent" and that "a dismissal is not the same as an acquittal."

Thus, we find that there was substantial evidence supporting a verdict on punitive damages in favor of Huson.

D. Municipal Liability

Castle Rock contends that the district court should have determined that, as a matter of law, the City was not liable on Huson's claims.

Under § 1983, municipal liability may be imposed only if Huson establishes that his injuries were the result of an "official policy." *See Thompson v. City of Los Angeles*,

885 F.2d 1439, 1443 (9th Cir. 1989). "A decision properly made by a local government entity's authorized decision-maker – i.e., an offical who 'possesses final authority to establish [local government] policy with respect to the [challenged] action' – may constitute official policy." *Id.* (alteration in original) (quoting *Pembauer v. City of Cincinnati*, 475 U.S. 468, 481 (1986) (plurality opinion)). "Furthermore, a single action by the final decisionmaker may be sufficient to establish that a municipality has a policy that infringes on a person's constitutional rights." *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 889 (9th Cir. 1990). Whether an official had final policy-making authority is a question of state law to be decided by the court before the case is submitted to the jury. *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1988).[4]

The district court gave the jury the following instruction on municipal liability:

> If you find that defendant Vaughn is liable under plaintiff's Washington State law false arrest and/or malicious prosecution claims, then the Court will automatically enter judgment in plaintiff's favor also against defendant City of Castle Rock because it employed defendant Vaughn at the time in question.
>
> However, a finding of liability against defendant Vaughn on one or more of plaintiff's Section 1983 claims does not mean that the

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[4] The district court did not make an express finding that Vaughn was a final policy-maker, but he implicitly made such a finding by submitting the municipal liability issue to the jury. The district court did not separately instruct the jury on the definition of a policy-making official.

Court will automatically enter judgment against defendant City of Castle Rock on those claims. Federal law provides that a judgment under Section 1983 may only be entered against defendant Castle Rock if the violation of plaintiff's constitutional rights occurred pursuant to an official policy or practice of the City of Castle Rock.

A municipality is liable under Section 1983 for a deprivation of civil rights only if such an element described in Instruction 14 is proven and the deprivation of civil rights was caused or inflicted pursuant to official policy.

Official policy is:

1. A policy statement or decision that is officially promulgated or made by the municipality's lawmaking officers or by a policy making official; or

2. An unconstitutional act or ratification of an unconstitutional act by a policy making official where the decision maker possesses final authority to establish municipal policy with respect to the action taken; or

3. An unconstitutional act resulting from a policy maker's reckless disregard for or deliberate indifference to the rights of plaintiff.

"Deliberate indifference" is an act or failure to act that is done with a callous indifference or thoughtless disregard of the consequences of one's actions or failure to act on the rights of others.

Actions of officers or employees of a municipality do not render the municipality liable

under Section 1983 unless they execute official policy as defined above.

Instruction No. 21. [ER 43]

On appeal, Castle Rock does not challenge the substance of this instruction or the law applied by the district court. Rather, Castle Rock argues that the issue of municipal liability should not have been submitted to the jury because Huson failed to present any evidence that would establish municipal liability under any of the three definitions of official policy in the instruction. We therefore review the district court's denial of Castle Rock's motions for directed verdict and JNOV under the standards enunciated above.

Viewing the evidence in the light most favorable to Huson, we cannot say that it supports *only* the conclusion that municipal liability is inappropriate. Huson presented evidence that could reasonably support the conclusion that Vaughn, as chief of police and a final policy-maker for Castle Rock, acted with callous indifference or thoughtless disregard of the consequences of his arrest of Huson without a warrant and without probable cause. This would support municipal liability under the third definition of "official policy" in the jury instruction.

E. Other Evidentiary Issues

1. Expert Testimony Re Professional Standards of Conduct

Vaughn and Castle Rock contend that the district court improperly allowed Huson's law enforcement expert to testify that Vaughn recklessly and intentionally

disregarded professional standards in conducting his investigation of the theft. [ER 73-75]

This argument is without merit. That Vaughn acted recklessly and intentionally were ultimate issues to be decided by the jury. As noted above, Rule 704 permits expert opinion testimony on such ultimate issues. Moreover, Rule 702 permits expert opinion testimony comparing the conduct of the parties to the industry standard. *See Davis v. Mason County*, 927 F.2d 1473, 1484-85 (9th Cir.) (admission of opinion testimony of an expert – the same one involved in this case – on the issue of recklessness was not an abuse of discretion), *cert. denied*, 112 S. Ct. 275 (1991). The district court did not abuse its discretion by admitting the expert testimony.

2. Evidence Re Refusal to Take Polygraph Examination

Finally, Vaughn and Castle Rock contend that the district court abused its discretion by admitting evidence that the juvenile boarder, suspected of committing the theft, declined to take a polygraph examination after being interviewed by Vaughn. They argue that this evidence was irrelevant and prejudicial.

Under Fed. R. Evid. 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under Fed. R. Evid. 403, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . . "

Evidence that the juvenile boarder refused to take a polygraph examination is relevant to show what information Vaughn had before he consulted with the prosecuting attorney and before he arrested Huson. That information has some tendency to show that Vaughn did not act reasonably.

In the cases cited by Vaughn and Castle Rock for the proposition that the polygraph evidence is prejudical, the evidence was being used against the party who refused to take the polygraph examination. *See, e.g., Aetna Ins. Co. v. Barnett Bros., Inc.*, 289 F.2d 30, 34 (8th Cir. 1961). The danger of unfair prejudice to Vaughn, who was not the subject of the refusal to take a polygraph examination, does not outweigh the probative value of the polygraph evidence. The district court did not abuse its discretion by admitting this evidence.

AFFIRMED.[5]

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[5] Under 9th Cir. R. 39-1.6, Huson's request for attorney's fees shall be filed within thirty days of the entry of this disposition. Under Rule 39-1.7, Vaughn and Castle Rock's opposition shall be filed within fourteen days after service of the request.

UNITED STATES DISTRICT COURT
Western District of Washington

Michael D. Huson

v.

City of Castle Rock, et al.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C89-565(T)Z

(Filed Jan. 7, 1992)

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Jury finds in favor of the plaintiff in the amount of $210,000.

_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff Michael D. Huson is granted judgment against City of Castle Rock and Gilbert R. Vaughn in the amount of $200,000 in compensatory damages and further additional judgment against defendant Vaughn in the amount of $10,000, for punitive damages, together with costs and reasonable attorneys fees to be hereafter determined by the Court.

BRUCE RIFKIN, Clerk

January 7, 1992
Date

By /s/ Casey Condon
Casey Condon
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL D. HUSON, Plaintiff-Appellee, v. THE CITY OF CASTLE ROCK; GILBERT R. VAUGHN, in his Official Capacity and Individually, Defendants-Appellants.	No. 92-35186 D.C. No. CV-89-564-TSZ ORDER (Filed Apr. 21, 1994)

Before: GOODWIN, SCHROEDER, and PREGERSON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.